
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: June 28, 1991
CASE NO. 86-ERA-32

IN THE MATTER OF

CAROLYN LARRY,
COMPLAINANT,

v.

THE DETROIT EDISON COMPANY,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

This proceeding arises under Section 210 of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). Before me for review is a [Recommended] Decision and Order (R.D. and O.) issued on October 17, 1986, by Administrative Law Judge (ALJ) Glenn Robert Lawrence. In early 1986, complainant Carolyn "Kate" Larry apprised the Nuclear Regulatory Commission (NRC) that it had been provided false information during an investigation of Respondent Detroit Edison Company's Enrico Fermi II Nuclear Power Plant. During the preceding eight months Complainant had raised safety concerns regarding the subject of the investigation. Shortly after Detroit Edison

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personnel became aware of Complainant's communication with the NRC, Respondent reassigned her to perform a less desirable job. The ALJ determined that Complainant had been subject to employment discrimination because of her protected activity and that any legitimate reason proffered by Respondent for its action was pretext. I agree.

FACTS

Complainant was hired by Respondent in June 1982 as a Nuclear Security Officer (NSO). NSO personnel are uniformed armed guards with onsite arrest powers. In January 1984, Complainant was promoted to the staff position of Background Investigator, and in September 1985, her title was changed to Nuclear Security Specialist (NSS). *See* Plaintiff's Exh. 14. As a Background Investigator/NSS, Complainant was responsible for conducting security investigations of employees and prospective employees and for ensuring plant compliance with nuclear safety procedures and regulations.

In June 1985, Respondent installed a Comprehensive Electronic office (CEO) computer system used for data input and output, but with word processing capabilities. Hearing Transcript (T.) 445, 455-456. Complainant became concerned about the type of information entered in the system. Special precautions are required to protect confidential "safeguards" information against unauthorized disclosure, *see* 10 C.F.R. § 73.21 (1990), and Complainant believed that the CEO system was not sufficiently secure for use in processing this information.[1] Complainant and her work leader, who shared her concerns, raised the issue with Stuart Leach, then Director of Nuclear Security. He instructed Complainant to prepare a memorandum to General Director James Piana requesting a determination. The memorandum was issued on July 1, 1985. Complainant and her work leader also conducted an investigation and submitted a report which contained findings. Plaintiff's Exhs. 1, 2A, 2B. In mid-July, Complainant's immediate supervisor, Samuel Thompson, discussed her concerns, assuring her that management was considering them.

In September 1985, when Wayne Hastings replaced Leach as Director of Nuclear Security, Complainant again raised her security concerns, and Hastings is documented as having seen her report and findings on September 30. Thereafter, during a

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discussion with Hastings, Thompson, and an NRC inspector, Complainant requested the inspector's determination. The inspector agreed that safeguards information should not be processed on the CEO system.

At the end of October 1985, the Fermi II Plant experienced a "drywell incident" requiring submission of a "five-day letter" which contained safeguards information. As Hastings dictated the letter, his secretary, Cindy Cody, contemporaneously typed it into the CEO system. It remained in the system for several days as it was edited, printed, and copied. T. 385-389 (Larry), T. 446-447, 453, 456, 459, 466, 503-504 (Cody).

In November 1985, Complainant privately discussed Hastings' action with an NRC inspector. Following an investigation and finding of violation, the NRC, in early February 1986, provided Complainant with a copy of its report which contained information that Complainant believed was false and misleading. T. 353. By letter of February 24, 1986, Complainant communicated these views to the NRC. During an

onsite inspection on or about March 10, and within hearing distance of Mr. Hastings, an NRC inspector referred to Complainant's February 24 letter in a telephone conversation with his supervisor. According to employee witnesses, the inspector, whose announced purpose was to investigate safeguards allegations, identified Complainant as having written the charging letter. T. 554-557, 583-584, 587- 589, 593-595. Hastings and Piana decided to demote Complainant in late March. No reason was provided Complainant for her demotion. T. 361, 375.

The ALJ found that Complainant engaged in protected activity in "making the NRC aware of a possible safeguards violation" and that Respondent reassigned her to less desirable work in retaliation for her protected activity. R.D. and O. at 6. The ALJ rejected Respondent's stated "legitimate" reason for the reassignment, *i.e.*, job rotation. R.D. and O. at 6-8. The ALJ expressly discredited Mr. Hastings' testimony in which he denied knowledge of Complainant's protected communication with the NRC, and he found animus toward whistleblowers in general and Complainant in particular on the parts of Messrs. Hastings and Piana.

DISCUSSION

1. *The Merits*

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Under the burdens of proof and production in "whistleblower" proceedings, Complainant first must make a prima facie showing that protected activity motivated Respondent's decision to take adverse employment action. Respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. Complainant then must establish that the reason proffered by Respondent is not the true reason. Complainant may persuade directly by showing that the unlawful reason more likely motivated Respondent or indirectly by showing that Respondent's proffered explanation is unworthy of credence. *Dartey v. Zack Co.*, Case No. 80-ERA-2, Sec. Dec., Apr. 25, 1983.

In order to establish a prima facie case, Complainant must show that she engaged in protected activity, that she was subject to adverse action, and that Respondent was aware of the protected activity when it took the adverse action. Complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action.[2] Under the ERA, an employee is protected if [s]he

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under this chapter . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter . . . ; (2) testified or is about to testify in any such proceeding; or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purpose of this chapter . . . .

42 U.S.C. § 5851(a).

Complainant made a prima facie showing. A complaint or charge concerning an unsafe condition and its investigation communicated to management or to the NRC is protected under the ERA. Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1510-1513 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1162. Over an eight-month period, Complainant engaged in the protected activity

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of making both internal and external complaints and charges about unsafe usage of the CEO and about the consequent NRC investigation. Transfer to a less desirable job may constitute adverse action. DeFord v. Secretary of Labor, 700 F.2d 281, 287 (6th Cir. 1983). After extended safety activity and immediately following written charges to the NRC, Complainant was demoted.

Causation also is shown. Between November 1985 and March 1986, as Complainant persisted in seeking a determination regarding the CEO system, her relationship with Hastings became increasingly strained. *See Donovan v. Stafford Const.. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984). Moreover, the decision to demote Complainant closely followed disclosures regarding Complainant's letter to the NRC. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Mitchell v. Baldrige*, 759 F.2d 80, 86 and n.6 (D.C. Cir. 1985); *Burrus v. United Telephone Co. of Kansas Inc.*, 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982) (causal connection established by showing that employer was aware of protected activity and that adverse action followed closely thereafter).

Respondent makes much of Complainant's and Hastings' purported "social relationship," suggesting that its "deterioration" explained Hastings' distanced behavior. Resp. Exceptions at 27-32. The record does not support this theory. on a single occasion -- a Sunday in November 1985 -- Complainant accompanied Mr. Hastings to a company-sponsored Christmas bazaar at one of Respondent's facilities. This occasion constituted the extent of any "social relationship." T. 372-374, 416-417.

Hastings was cordial to Complainant at that time. Between November 1985 and April 1986, Hastings "went [from] friendly to standoffish to I no longer existed." T. 430 (Larry). Complainant testified that after an initial discussion with NRC Inspector Pirtle in late 1985, both she and her work leader

> felt that our work was being kind of nit picked . . . . Mr. Hastings was coming around -- some comments were made to me about, we have to protect the safeguards information . . . kind of little digs type things. In the months that followed [Hastings] might say hello to me. Towards the end he would . . . not even acknowledge [me].

T. 430-431. Complainant also testified: "After my [NRC] letter, I was completely invisible unless he had to speak to me." T.

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370-371. NSS employee Max Agge likewise perceived alterations in Hastings' behavior. According to Agge, following investigation of the CEO violation, Hastings exhibited "a lack of trust towards the [NSS] staff members. . . . The [staff's] concern was of meetings that the staff personnel didn't go to, decisions that the staff personnel weren't allowed to be in on. . . . We weren't consulted on certain areas." T. 571-572.[3]

During this period, Hastings manifested frustration and anger at NRC pressure. Complainant testified about Hastings' conduct at a staff meeting following an NRC visit. [Hastings] was . . . angry that the NRC did not understand [Respondent's] staff positioning and . . . organization. [He said] the NRC was too stupid to figure it out and their [organization] was hard to understand and he couldn't understand why they couldn't understand ours." T. 432. General Director Piana concurred that Respondent experienced difficulty in meeting NRC standards. T. 736. Hastings acknowledged that he preferred his employees not "to be unduly helpful" to the NRC, and he disapproved of employees reporting violations to the NRC. T. 259, 270. I agree with the ALJ that Hastings' strained relationship with NSS staff members and with Complainant in particular evinced animus.

It is uncontroverted that Hastings knew about Complainant's internal complaints regarding use of the CEO system for processing safeguards information. He also knew that in late 1985 the NRC had investigated his abuse of the system. In March 1986, the NRC returned, again investigating safeguards allegations. The ALJ expressly discredited Hastings' testimony that he did not know about NRC Inspector Pirtle's March 10, 1986, telephone conversation. R.D. and O. at 7. Employees Agge and Bielaniec, who overheard the inspector name the Complainant as having sent the charging letter, related the event to Complainant and her supervisor, Mr. Thompson, shortly after it occurred. T. 277-278, 356-357, 553-559, 580-584, 593-594. Agge explained: "We knew [Pirtle] was down there for an allegation . . . . That just caught my ear when he mentioned Kate's name and the fact that they [were] talking to her about a letter, because his conversation was dealing with safeguards." T. 554-555. Agge testified:

> A. I stood up when I heard Kate's name mentioned . . . I just stood up to see who was around . . . [O]ther than Mr. Hastings in his office, and myself at my desk, I don't recall seeing any other persons in the area.

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> Q. How did you know Mr. Hastings was in his office at this time?
> A. Because Mr. P[i]rtle had just exited [Hastings'] office. . . . I know Mr. P[i]r[t]le and Mr. Hastings were in the office together. [W]hen I stood up I could see Mr. Hastings in his office. He was by his desk.

T. 580-584. Agge testified that he and Hastings were equidistant from the inspector as he conversed by telephone with his supervisor, each being approximately ten to fifteen feet away, and that the door to Hastings' office was open. T. 558-559, 587- 588. Pirtle used the telephone at Hastings' secretary's desk immediately outside Hastings' office. T. 485-486. I also note that Hastings' testimony, in which he denied knowledge of Pirtle's conversation, is evasive and unresponsive. T. 95. Upon consideration of the record in its entirety, including the ALJ's credibility finding rejecting Hastings' denial, I find that Hastings knew about Complainant's charges to the NRC which precipitated Inspector Pirtle's return.

In its defense, Respondent proffered the "legitimate" motivation of job rotation, which Complainant successfully rebutted as pretext. R.D. and O. at 6-8. As noted by the ALJ, R.D. and O. at 6, under Respondent's professed system, any "rotation" of Complainant should have occurred in June 1986, at the six-month interval rather than in April, mid-way through that particular assignment term. In addition, Complainant was not apprised that job rotation was the reason for the reassignment. T. 375. Finally, Complainant's reassignment made little sense in the context of Respondent's plant development. Complainant had received "excellent" performance evaluations from Supervisor Thompson and had acquired considerable experience in programs that Respondent was under time constraints to implement. She also had received special training in preparation for the work that she was performing at the time of her abrupt reassignment. *See* T. 280-283, 308-311 (Thompson); Plaintiff's Exh. 10. In contrast, Complainant's replacement was inexperienced and untrained. Thompson opposed Complainant's reassignment because

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be believed that it would jeopardize his ability to meet the program objectives and would raise concerns with the NRC. Plaintiff's Exh. 10, P. 2. Accordingly, Complainant has prevailed on the merits or her complaint.

2. *Timeliness*

Under the ERA, employees who believe that they have been discriminated against must file their complaint "within thirty days after such violation occurs . . . . " 42 U.S.C. § 5851(b). The date of the decision to implement an adverse employment action, rather than the date the consequences are felt, marks the occurrence of the " violation." *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988). *See Chardon v. Fernandez*, 454 U.S. 6 (1981); *Delaware State College v. Ricks*, 449 U.S. 250, 256-259 (1980); *Hamilton v. First Source Bank*, 928 F.2d 86 (4th Cir. 1990) (en banc). Thus, the ERA 30-day limitations period runs from the date the employee receives final, definitive, and unequivocal notice of the adverse decision. *English v. Whitfield*, 858 F.2d at 961-962.

Charging periods are subject to equitable modification, however. *Zipes v. Transworld-Airlines, Inc.*, 455 U.S. 385, 393 (1982). Respondents have been estopped from claiming

the defense where they have induced or lulled an employee into neglecting to file promptly. Estoppel also may be appropriate if "failure to file results from 'a deliberate design by the employer or [from] actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.'" *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 308 (3d Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984), *quoting Price v. Litton Business Systems, Inc.*, 694 F.2d 963, 965 (4th Cir. 1982). In such circumstances, an employee may be aware of his statutory cause of action "but does not make a timely filing due to his reasonable reliance on his employer's misleading or confusing representations or conduct." *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 752 (1st Cir. 1988). Modification of the filing period thus serves as a corrective mechanism.[4] *See English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987).

On April 9. 1986, Complainant received word from Supervisor Thompson that she would be "returned to uniform." Her transfer

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took effect on April 27, and she filed her discrimination complaint on May 19. The ALJ found that the April 9 notification was not "unequivocal." R.D. and O. at 5. As the ALJ pointed out, Complainant received no written notice documenting "the specifics of the transfer." *Compare Felty v. Graves-Humphreys Co.*, 785 F.2d 516, 519 (4th Cir. 1986). No one provided her with any reason for the action. T. 361, 375. She contemporaneously was provided with a copy of Supervisor Thompson's April 7 memorandum to Piana and Hastings in which he strongly objected to any transfer and requested that she remain. T. 410, 415. *Compare English v. Whitfield*, 858 F.2d 962 (notice was unequivocal absent any intimation that decision was subject to further appeal or reexamination). Thompson had been apprised of the determination to transfer Complainant upon his return from vacation, and management thereafter agreed to receive and consider his memorandum and presentation on the transfer issue. T. 279-280. In his memorandum, Thompson pointed out that the NRC had made clear during a recent inspection "exit meeting" that it expected Respondent to "stabilize"" its security organization by instituting permanent employment positions. He believed that rotation of Complainant back to uniform would

> seriously impair the security staff's ability to adequately implement the proactive compliance and evaluation program and the (performance improvement program (PIP)]. Kate Larry was assigned 95% of her time to this project [and she had] two years experience in this type of work . . . . To replace Kate (and another employee[5]] who are two of our most experienced personnel and to replace them with . . . people who have had no formal training and are unfamiliar with the PIP and the compliance evaluation program would be counterproductive to enabling us to meet the objectives of both programs, not to mention the concerns the NRC may have . . . .

Plaintiff's Exh. 10. Complainant was not apprised of the outcome of a subsequent meeting in which Thompson's objections were overridden.

As discussed *supra*, notice of an adverse job action that is final, definitive, and unequivocal commences the limitations period. "Final" and "definitive" notice denotes communication

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that is "decisive" or "conclusive," *i.e.*, "leaving no further chance for action, discussion, or change." "Unequivocal" notice denotes communication that is "not ambiguous," *i.e.*, free of misleading possibilities. Webster's New World Dictionary (Third College ed. 1988). Here, Supervisor Thompson, alone, notified Complainant of the proposed job action. At the same time, he had initiated a serious challenge to the proposal and held out the possibility of reversal. The notice thus appears ambiguous and inconclusive.

However, regardless whether the April 9 notice was adequate, modification of the limitations period is in order as the result of Respondent's Equal Employment Opportunity (EEO) scheme. Respondent maintained a company EEO office in downtown Detroit and employed Denise Gately O'Keefe as the EEO Specialist. T. 395-396. Notices posted at plant work locations and outside the downtown office advised employees that "whistleblower" discrimination complaints should be directed to the EEO office. T. 605-607. *See* Plaintiff's Exhibit 15 (Respondent's "Position Letter") in which Respondent attests: "The Michigan [Whistleblowers Protection] Statute requires a 'Notice to Employees' poster. Such poster states that whistleblower concerns should be directed to the Company's EEO organization."). *See also* T. 362-364. Ms. O'Keefe maintained an "open door policy." Upon meeting with complaining employees, she explained that she functioned as a mediator between employees and management for purposes of complaint resolution. T. 609, 640. In reality, Ms. O'Keefe was "responsible for representing the company, preparing the company's position statement, and representing the company at any fact finding or resolution conferences that are conducted." T. 605 (O'Keefe). *See* T. 617, 637; Plaintiff's Exh. 15, pp. 10-11. Ms. O'Keefe did not disclose her responsibility as company representative to complaining employees. T. 638. She assured the employees, however, that she expected to "give [their complaints] immediate attention." T. 618.

Complainant consulted Ms. O'Keefe on April 10 at the downtown office and thereafter at the Fermi II Plant. In response to Complainant's inquiry, ms. O'Keefe assured Complainant "that she [Complainant] was in the right place" if she wished to pursue "a mediation process." T. 609.[6] Ms. O'Keefe also made clear that should Complainant file a formal

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discrimination complaint with Respondent or with any external agency, she (Ms. O'Keefe) immediately would cease her mediation efforts. T. 611.

Complainant explained her whistleblower complaint in detail. Pursuant to Ms. O'Keefe's request, Complainant tendered documentation, including her performance appraisals, letters of recommendation, memorandum requesting a safeguards determination, and correspondence with the NRC. T. 362-364, 609-617. Ms. O'Keefe represented that she would attempt to conciliate the matter with Messrs. Hastings and Piana. T. 411-412. Ms. O'Keefe never contacted either manager. T. 623. Instead, she met with Respondent's Legal Department to discuss Complainant's whistleblower case, and she "turned over" Complainant's documentation to the Legal Department. T. 623, 628-629.

Respondent's EEO process clearly distracted Complainant in pursuing other recourse. Complainant testified:

> I went to the Detroit Edison Equal Opportunity. I felt that that would be the best place to go for help. . . . I told [Ms. O'Keefe] my story. I turned over all my documents from the N.R.C. [regarding] the CEO. She told me that we had a confidential relationship and she would get back to me as far as ray Complaint. . . . I called Ms. O'Keef[e] after a couple of days. I explained to her . . . that I had a certain amount of days before I had to go to the [W]age and [H]our [D]ivision . . . and I was hoping that Edison's Equal opportunity could take care of it . . . . On two occasions that I called Ms. O'Keef[e], she told [me] she had not yet been able to schedule an appointment with Mr. Piana and she had to talk to . . . her supervisor about the problem . . . . After that, she would not answer my calls at all or return the calls when I would leave messages and it was at that time that my time was running out, that I went to the [W]age and [H]our and filed a Complaint there.

T. 362. While seeking a resolution through Ms. O'Keefe, Complainant remained uncertain as to whether the ERA limitations period ran from the date of notification, the date of transfer, or the date that Ms. O'Keefe ceased her conciliation efforts. T. 362 (Larry), T. 630, 637 (O'Keefe).[7]

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Had Complainant not been occupied with Ms. O'Keefe, she could have focused more fully on ERA procedures, including verifying the limitation. Here, Respondent engaged in "misleading [and] confusing representations [and] conduct." *See Kale v. Combined Ins. Co. of America*, 861 F.2d 752. The ERA imposes a sharply abbreviated limitations period.[8] In this circumstance, Respondent "should unmistakably have understood" that its "deliberate design" to delude Complainant and to divert her attention and energies would cause delay. *See Meyer v. Riegel Products Corp.*, 720 F.2d 308.

Finally, primary objectives in imposing an expeditious time frame, *i.e.*, prompt notice to Federal regulators and the employer of safety violations and retaliatory behavior, were met. *See English v. General Electric Co.*, ___ U.S. ___, 110 S. Ct. 2270, 2280-2281, 110

L. Ed. 2d 65, 81 (1990). Contemporaneously with the installation of the CEO system, Complainant raised her safety concerns with, and requested a determination from, the Respondent employer. In the course of her job duties, she investigated the issue and prepared and presented her findings. she initiated discussion among Respondent's management and NRC inspectors, eliciting the NRC determination that the CEO system should not be used for processing safeguards information. Confronted with Director Hastings' blatant abuse of the system, Complainant complained privately to the NRC whose investigation revealed regulatory violations. She complained further after recognizing that Respondent had provided the NRC with false information. Immediately following word of her demotion, complainant sought conciliation through Respondent's EEO office. She also notified Respondent, at that time, that she intended to file an external discrimination complaint. Thus, Complainant consistently apprised Respondent and the NRC of her safety concerns in a timely fashion, and she avoided any prejudice to Respondent in the preparation of its discrimination defense by promptly apprising Ms. O'Keefe (and Respondent's Legal Department) of her claim. *See Andrews v. Orr*, 851 F.2d 146, 151-152 (6th Cir. 1988).

Accordingly, I find that in its EEO process Respondent misled and diverted Complainant in filing her ERA complaint and that the complaint is timely because the 30-day limit is equitably tolled.

3. *Remedy*

Upon a finding of violation under the ERA, a complainant is entitled, inter alia, to reinstatement to her former position

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"together with the compensation . . . terms, conditions, and privileges of h[er] employment . . . ." The Secretary also shall award "all costs and expenses (including attorneys' . . . fees) reasonably incurred . . . by the complainant . . . . " 42 U.S.C. § 5851(b)(2)(B). Complainant did not request a back pay award. She did request, and the ALJ found, that she should be reinstated to the NSS position that she had held prior to her return to uniform. R.D. and O. at 8. Similar reinstatement was ordered in *DeFord v. Secretary of Labor*, 700 F.2d 289, where, as here, "there [was] no sign in the record that [the] previous position ha[d] ceased to exist . . . . " As Supervisor Thompson agreed, after having worked in a Background Investigator/NSS capacity for in excess of two years, Complainant had "satisfied the audition" for the job, T. 331, and Director Leach had promised it to her in late 1985. T. 308-314, 378-379, 422-423. The evidence shows that NSS positions became permanent shortly after Complainant's return to uniform; that Complainant's experience and extensive, specialized training qualified her for the position; and that she would have become a Nuclear Security Specialist but for her unlawful demotion. T. 219/11-219/12, 234, 272-273, 292, 309-322, 331, 422-423, 438, 551-552.

Accordingly, Respondent is ordered to reinstate Complainant to the position of Nuclear Security Specialist. Although costs and expenses of $9,450.00 were assessed in the ALJ's Order Granting Fee Petition issued April 17, 1987, the parties have not briefed the appropriateness of this assessment. A period of 20 days from receipt of this Decision and Order is granted for any briefing on this issue. Counsel for complainant also is permitted a period of 20 days in which to submit any petition for fees and expenses incurred in review of the ALJ's R.D. and O. before the Secretary. Respondent thereafter may respond to any petition within 20 days of its receipt.

SO ORDERED.

LYNN MARTIN
Secretary of Labor

Washington, D.C.

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[ENDNOTES]

[1] Complainant pointed out (1) that the system was not selfcontained at the Fermi II Plant in that four of its unprotected telephone lines ran to Respondent's downtown facilities, (2) that system "superusers" could gain access to accounts other than their own, (3) that documents stored in the system during editing were accessible for the period of storage, and (4) that the potential existed for unsafe document disposal. T. 388; Plaintiff's Exh. 2A.

[2] Complainant's prima facie case requires a showing sufficient to support an inference of unlawful discrimination. This burden is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Direct evidence is not required for a finding of causation. The presence or absence of retaliatory motive is provable by circumstantial evidence, even in the event that witnesses testify that they did not perceive such a motive. *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981). *Accord Mackowiak v. University Nuclear Systems Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

[3] Agge's observations about Hastings are consistent with employee SAFETEAM comments. *See* Joint Exh. 1. (Managed by a subsidiary of Respondent, SAFETEAM interviews employees about their safety concerns and issues recommendations for improvements. T. 111.)

[4] The following circumstances have precipitated estoppel: An employer's "positive signals" regarding amical resolution, false assurances by an employer that it intends to settle the claim, an employer's failure to provide agreed upon information, and an

employer's misrepresentation as to reasons for its employment action or misinformation as to employee rights. *Dillman v. Combustion Engineering, Inc.*, 784 F.2d 57, 61 (2d Cir. 1986); *Meyer v. Riegel Products Corp.*, 720 F.2d at 307; *Cooper v. Bell*, 628 F.2d 1208, 1214 (9th Cir. 1980); *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1262 (10th Cir. 1976), *aff'd per curiam by an equally divided court*, 434 U.S. 99 (1977). "An employer who misrepresents its intent to remedy an alleged unlawful practice should expect that the aggrieved employee will delay filing suit in reliance on the employer's promise that the practice will be corrected." *Coke v. General Adjustment Bureau, Inc.*, 616 F.2d 785 790 (5th Cir.), *rehearing granted*, 622 F.2d 1226 (1980), *decision on rehearing*, 640 F.2d 584 (1981) (en banc).

[5] The other employee who was returned to uniform had engaged in extensive criticism of Respondent during SAFETEAM interviews, and he believed that his comments had been leaked to management. This interpretation supports the ALJ's identification of animus in Mr. Pianas testimony: "Mr. Hastings and I met and decided it was a good time to enact our plan to get rid of any -- scratch that please." R.D. and O. at 7; T. 723.

[6] Complainant also testified:

> A: I told her about the [EEO] notice to employees and I had a certain time limit and that if this wasn't the right place to be, please let me continue to the State or the Federal --
> Q: What did she say in response to that?
> A: She said that I was in the right place.

T. 400.

[7] Although Complainant expressly raised the issue, Ms. O'Keefe apparently declined to advise her of the correct interpretation.

[8] *Cf. Hicks v. Colonial Motor Freight Lines*, Case No. 84-STA-20, Sec. Dec., Dec. 10, 1985, slip op. at 11 (relatively short filing period may militate in favor of equitable tolling).